

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-214466.2
B-214466.3
DATE: July 9, 1984
MATTER OF: Control Central Corporation; American
Technical Services, Inc.

DIGEST:

1. Bidder which limited bid guarantee period to 25 days effectively limited bid acceptance period to 25 days. Although solicitation permitted bidders to offer less than the standard 60-day bid acceptance period, bid which offered 60-day acceptance period with 25-day bid guarantee is unacceptable after 25-day period.
2. Protest that two offerors in step one of two-step procurement which submitted late revised proposals should not be permitted to be included when negotiations are reopened by subsequent amendment is denied since such action was reasonable and in furtherance of government policy of qualifying as many proposals as possible under step one.

Control Central Corporation (CCC) and American Technical Services (ATS) protest the award of a contract to any other firm under solicitation No. DE-FB96-83P011079 issued by the Department of Energy (DOE), Strategic Petroleum Reserve Project Management Office (SPRPMO). As the first step of a two-step, formally advertised procurement, DOE issued a request for technical proposals for the design, manufacture, installation and testing of a Distributed Control System at the Big Hill Oil Storage Facility. CCC contends it submitted the lowest responsive bid under step two of the solicitation and that it should be awarded the contract.

ATS, which submitted the highest of the four bids received, contends that the three lower bids should be rejected and award made to it. ATS contends that two of the offerors, Coggins Systems Ltd. (Coggins) and L&J

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Engineering, Inc. (L&J), submitted late revised proposals and, therefore, should not have been permitted to participate in the second step of the procurement.

Based upon our review of the record, we deny the protests.

Step one of the solicitation was issued July 19, 1983. Of the 13 proposals received, seven were determined to be reasonably susceptible of being made acceptable through proposal revisions. The seven firms were Coggins, L&J, Penta Corporation (Penta), CCC, ATS, Continental Controls, Inc. (Continental), and Industrial Control Specialists, Inc. (Industrial).

By letter dated November 23, 1983, the contracting officer informed each of these seven firms of the areas of its proposal which required additional information. Revisions to proposals were due by December 14, 1983, 2 p.m. central time. Two of the seven firms, L&J and Coggins, failed to submit timely revisions. Coggins' revised proposal was received at 2:21 p.m. on December 14, 1983, and additional proposal revisions were received on December 15, 1983. L&J's proposal revision had apparently been lost in transit.

The DOE/SPRPMO technical evaluation board recommended that Penta's and Continental's proposals, as revised, be considered as acceptable. CCC's proposal was recommended as acceptable, even though it contained what the contracting officer thought was an unacceptable deviation from the government's technical specification. The board described this deficiency as minor.

The remaining four proposals were considered unacceptable. The Coggins and L&J revised proposals were not timely received and, thus, were rated as "unacceptable." ATS's proposal was found unacceptable primarily because of an unacceptable deviation from the government's specifications. Industrial Control Specialists' proposal was deemed unacceptable primarily because of informational deficiencies.

DOE reports that the contracting officer reviewed these findings and recommendations and discussed them with the technical review board. The contracting officer concluded that, based upon the evaluation criteria contained in the solicitation, only two proposals could be considered acceptable. The contracting officer also concluded that the five other proposals which could not be considered acceptable continued to be reasonably susceptible to being made acceptable. With regard to ATS's interpretation of a solicitation requirement, which was at variance with the government's interpretation of that requirement, the contracting officer determined that the offeror's interpretation was reasonable and that the government's specification was ambiguous. Therefore, in order to correct this ambiguity and to enhance competition, the contracting officer decided to amend the solicitation and to conduct further discussions with the offerors. Amendment No. 7 was issued to all seven offerors on January 5, 1984, and telephonic discussions were held with each of the offerors. All seven offerors were invited to submit written proposal revisions and a common cutoff date and time of January 13, 1984, 2 p.m. central time, was established for receipt of any revisions.

All seven offerors responded by that date and all proposals were found to be acceptable. Accordingly, the second-step IFB was issued on January 24, 1984, to the seven offerors. Bids were opened on February 8, 1984, and the IFB allowed bidders the option of designating their bid acceptance period but, if no period was specified by the bidder, the bid acceptance period would be 60 days. The IFB also required that a bid guarantee be submitted with the bid and that acceptable payment and performance bonds be furnished within 5 days after award of a contract.

On February 6, 1984, Penta filed a protest with the contracting officer contending that Coggins and L&J should be prohibited from bidding on the grounds that these two firms were late in submission of clarification to their technical proposals and, therefore, should not have been considered qualified in step one.

The contract specialist advised Penta that bids would be opened as scheduled but that its protest would be

resolved prior to award. The following four bids were received by February 8, 1984:

CCC	\$1,284,000
Coggins	1,431,000
Continental	2,688,694
American Technical Services, Inc.	2,888,000

Industrial, L&J and Penta did not bid. CCC, Coggins and ATS offered a bid acceptance period of 60 days by not designating a different time period. CCC furnished an irrevocable letter of credit as its bid guarantee with an effective period of 25 days after bid opening (i.e., draft was required to be presented on or before March 5, 1984).

Because CCC's bid guarantee expired on March 5, 1984--25 days after bid opening--the contracting officer informed CCC by telephone on March 9, 1984, of the rejection of its bid.

CCC protested to DOE the rejection of its bid. The protester stated that the term specified in its bid guarantee was the result of a February 2, 1984, telephone conversation with the DOE contract specialist wherein CCC was informed that award was anticipated within approximately 2 weeks after bid opening. During the course of the contracting officer's deliberations regarding CCC's bid, two protests (from ATS and Coggins) in addition to Penta's protest were filed. ATS protested to the procuring agency and to our Office seeking to preclude Coggins, the second low bidder, and L&J from competing under the step-two IFB.

Coggins, on February 22, 1984, protested to our Office, contending that CCC submitted a nonresponsive bid because the bid guarantee provided was insufficient. CCC, by letter of March 13, 1984, to our Office, contended that an award to any bidder other than its firm would be improper and illegal.

Counsel for CCC states that the only reason for its short bid guarantee period was verbal advice from the

contract specialist that award was expected to be made within 2 weeks of bid opening.

It is our view that CCC's bid could not be accepted after March 5, when its bid guarantee period was expired. CCC's bid acceptance period was effectively limited to the 25 days (February 8 to March 5, 1984).

DOE refers to our decision in Munck Systems, Inc., B-186749, October 19, 1976, 76-2 CPD 345, which involved a situation where the solicitation required a 120-day bid acceptance period and a bidder offered a shorter bid guarantee period. In that case, we held that the bid was properly rejected as nonresponsive. We also noted that although the solicitation did not state that bid bonds' expiration dates must be coextensive with the bid acceptance period, in view of the purpose of the bid bond requirement (i.e., to protect the government's interest in the event that a successful bidder fails to execute a contract), we believed that this should be inferred from the solicitation language. We stated that the phrase "good and sufficient surety" implies security of the government's interest for the full duration of the IFB's acceptance period and not just for a portion thereof. The Munck case is only distinguishable from the present situation in that, here, the IFB did not require a specified bid acceptance period. However, while the bidder could insert any time period for bid acceptance, once the bidder chose a bid acceptance period--here, 60 days by inaction--the bid guarantee had to run for the same time period. Since CCC's letter of credit would not have been available after March 5, 1984, and since bid guarantee requirements are material requirements which the contracting officer cannot waive, the bid was unacceptable after the expiration of the 25-day bid guarantee.

While CCC contends that the government should have been able to make the award during its 25-day bid guarantee period, we find this allegation to be without merit.

Even if no protest against the award had been filed, the contracting officer states there was not sufficient time to make an award to CCC within its bid guarantee period and still assure adequate security for the government if CCC failed to provide performance and payment bonds. The contracting officer determined that a preaward survey and an

equal employment opportunity clearance would have been necessary before an award could be made to CCC since SPRPMO had no experience in dealing with CCC.

CCC's bid was only effective until March 5, 1984, and the contracting officer contends that in order to protect the government's interest, the bid guarantee would have to be effective until at least March 18, 1984. In the absence of contrary evidence, we find no basis to question the agency's position that CCC's bid guarantee did not afford the government sufficient time within which to process an award.

CCC also objects to the government making an award to Coggins at a price \$147,000 higher than its bid. Although the government must pay more when the low bid is rejected, to hold otherwise would tend to compromise the integrity of the competitive bidding system, A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194. We have held that the maintenance of the integrity of the competitive bidding system is more in the public interest than the pecuniary advantage to be gained in a particular case. Modern Moving and Storage, Inc., B-188223, May 2, 1977, 77-1 CPD 299.

ATS contends that it is the only bidder eligible for award. ATS's protest was filed here March 26, 1984, after it received DOE's March 14, 1984, decision dismissing its protest. DOE contends that ATS's contention that Coggins' bid price is too low is untimely filed. We agree. Our Bid Protest Procedures require that protests must be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier. This basis of protest was known or should have been known within 10 days of the February 8, 1984, bid opening. Moreover, a bidder's submission of a below-cost bid does not by itself provide a valid basis to challenge the award of a contract to that concern. See Richmond Gear, B-211589, May 9, 1983, 83-1 C.P.D. ¶ 491.

ATS contends that DOE should not have permitted Coggins and L&J to participate in step two since these two firms had submitted late revisions to their proposals. ATS contends that such action was unfair to other firms which submitted timely revisions to their proposals. ATS contends that if Coggins' and L&J's proposals were not acceptable without clarification and the clarification could not be considered because they were late, then their proposals remain unacceptable.

CCC also argues that since Coggins failed to submit a timely revision to its initial unacceptable proposal, it should not have been permitted later to participate in further negotiations. CCC objects to what it states is the contracting officer's overruling of the DOE technical panel, which had concluded that three offerors, including CCC, had submitted acceptable technical proposals after the first round of revisions. CCC states that the contracting officer decided that only two offers were acceptable. CCC also states that no reasons are given for the contracting officer's reversal of the technical evaluation, nor is there any indication that a written justification for this determination was made. Given the lack of justification, CCC argues that the contracting officer's determination to overrule the technical evaluation is arbitrary.

DOE refers to our decision in Burroughs Corporation, B-211511, December 27, 1983, 84-1 CPD 24, where we indicate that we will not question the judgment of the agency's technical and procurement personnel unless there is evidence of fraud, prejudice, abuse of authority, arbitrariness or capricious action.

DOE reports that, based on the evaluation criteria contained in the RFP, only two proposals, as revised, could be categorized as acceptable. The contracting officer determined that one proposal could not be categorized as acceptable because of an unacceptable deviation resulting from an ambiguity in the government's technical specification, first noticed as a result of an offeror's proposal revision. Since the five proposals which could not be categorized as acceptable continued to be reasonably susceptible to being made acceptable, the contracting officer decided to amend the RFP and conduct further discussions with all offerors, including the two firms whose proposals had been deemed acceptable.

As noted above, amendment No. 7 was issued on January 5, 1984. Telephonic discussions were held with each firm on January 6, 1984, to explain the intent of this amendment and to identify to each offeror those areas, if any, of its proposal which required clarification. Each offeror was invited to submit written proposal revisions and all seven firms responded by the date and time established.

All seven proposals, as revised, were found to be acceptable.

The contracting officer contends that in the interest of maximizing competition and in order to correct an ambiguity in the government's specification, he decided that a second round of discussions and proposal revisions were warranted. Once this decision was made, the contracting officer states that he was precluded from excluding any offeror whose proposal had been found to be reasonably susceptible to being made acceptable, which included Coggins and L&J. DOE states that the failure to submit timely proposal revisions to a proposal otherwise determined to be reasonably susceptible to being made acceptable does not constitute grounds for rejection of that proposal, but merely precludes consideration of any such revisions. DOE states that the contracting officer did not consider Coggins' and L&J's late revisions.

Our Office will ordinarily accept the technical judgment of the procuring agency's specialists and technicians as to the adequacy of a technical proposal, unless it is shown that the agency action was erroneous, arbitrary, or not made in good faith. Guardian Electric Manufacturing Company, 58 Comp. Gen. 119, 125 (1978), 78-2 CPD 376. DOE contends that no such evidence has been shown here.

DOE states that discussions with Coggins and L&J were based on their original proposals which had been determined reasonably susceptible to being made acceptable. DOE relies on our decision in Angstrom, Inc., 59 Comp. Gen. 588 (1980), 80-2 CPD 20, in support of its position that discussions with Coggins and L&J were required once the decision had been made to reopen negotiations. In that case, we pointed out that the first step of two-step, formal advertising, in furtherance of the goal of maximized competition, contemplates the qualification of as many proposals as possible through discussions, and that an agency should make reasonable efforts to bring step-one proposals to an acceptable status. There, the protester in step one did not timely respond to an amendment, but later indicated its compliance with the amendment requirements when negotiations were reopened by subsequent amendment. In those circumstances, we held that the agency's determination to exclude the protester's step-two bid from consideration was unreasonable.

In the Angstrom case, we also referred to Techniarts, B-189246, August 31, 1977, 77-2 CPD 167, where we held:

" . . . since the agency contemplated further negotiations with the other offerors, the agency should conduct further negotiations with the late responding offeror, if without considering the late response, the proposal was within the competitive range."

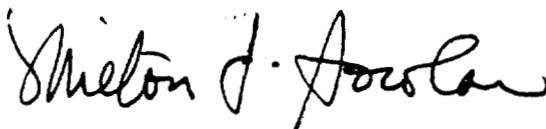
We disagree with CCC's position that Coggins should not have been permitted to participate in the second round of negotiations. Seven offerors, including Coggins and CCC, submitted timely initial proposals which were rated "conditionally acceptable" by the technical review board. After discussions with the board, the contracting officer considered those seven proposals as being reasonably susceptible to being made acceptable through proposal revisions. Five revised technical proposals were received by the cutoff date. Coggins' proposal revision was not timely received and, thus, was rated as "unacceptable" without these further requested revisions. Two revised proposals were rated as unqualifiedly acceptable by the technical evaluation board. CCC's proposal was rated as acceptable although its proposed graphics panel was not a "mosaic panel," as required. The technical evaluation board thought that a change could be made to provide for a mosaic panel, if CCC was the successful bidder. Given the mandatory nature of the mosaic panel, however, the contracting officer did not consider CCC's revised technical proposal acceptable and thought CCC's proposal needed further revisions if it was to be rated acceptable. DOE states that the technical evaluation board agreed with the contracting officer's determination in this regard. Contrary to CCC's contention, we find no evidence of arbitrary action on the part of the contracting officer in failing to follow the technical review board's recommendation that this first revised proposal of CCC be considered as acceptable.

As previously stated, ATS's proposal was also rated unacceptable, but the contracting officer believed that this was based upon an ambiguity in the technical specifications which misled ATS into submitting an unacceptable proposal. The technical evaluation board concurred with the contracting officer's assessment. Therefore, the IFB was

amended to make the requirements clear. After discussions with the technical evaluation board, it was decided that all seven proposals remained susceptible to being made acceptable. Therefore, DOE contends that discussions with all seven offerors were required.

In our view, the contracting officer acted reasonably in affording Coggins and L&J an opportunity to participate in a second round of negotiations once it was determined that the solicitation needed to be revised to correct an ambiguity. The real issue here is whether failure by Coggins and L&J to submit timely revised proposals was a proper basis to exclude those firms from further negotiations. Since the agency contemplated further negotiations with the other offerors, we believe it was proper to conduct further negotiations with the late responding offerors, where, without considering the late responses, the proposals were susceptible to being made acceptable.

For the reasons stated, the protests of CCC and ATS are denied.

for 
Comptroller General
of the United States